



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Conversational Voice Technologies Corporation

File: B-224255

Date: February 17, 1987

DIGEST

1. Where the contracting officer determines that urgency necessitates contract award without giving the unsuccessful offeror 5-day advance notice of the award to permit a protest of the successful offeror's size status, the contract award is valid. However, where a timely protest after award of the awardee's size status results in a Small Business Administration determination that the awardee was not a small business and was not eligible for award under the 100-percent small business set-aside, the agency should consider termination of the contract.

2. Protester-small business would not be prejudiced by continuation of contract awarded to a lower-priced large business under a small business set-aside because contracting agency would have resolicited on an unrestricted basis due to the protester's unreasonably high price, and the protester admittedly would not have lowered its price. The fact that the agency conducted discussions solely with the large business after the submission of proposals does not affect this conclusion because the protester's offer was technically acceptable and its price would not have been reduced.

3. Mere contention that awardee misrepresented its small business size status, absent sufficient evidence, does not constitute a basis for questioning award.

4. Fact that the contracting agency improperly negotiated with awardee but not with protester does not require contract termination where the protester would not have changed its price and the award was based on price.

DECISION

Conversational Voice Technologies Corporation (CVTC) protests the September 29, 1986, award to APEC Technology Limited

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of a contract for a telephone answering system (and various connected services) under request for proposals (RFP) No. DABT10-86-R-0230--issued by the Department of the Army, Fort Benning, Georgia as a 100-percent small business set-aside.

We deny the protest.

The procurement was originally synopsisized in the Commerce Business Daily (CBD) as a sole-source purchase of CVTC's ConMode Call Handling System. After APEC advised the activity that it could supply a system that also met its needs, the procurement was resynopsisized in the CBD as a 100-percent small business set-aside. Two offers were received by the September 25 closing date--one from CVTC priced at \$46,300; the other from APEC priced at \$35,000.

The RFP provided that the contract would be awarded to the responsible offeror that submitted the lowest-priced responsive offer, and APEC was in line for award on that basis. Prior to making the award, APEC was requested to review and confirm its price (in view of the 32 percent spread between its price and that of CVTC). At the same time, APEC was also requested to explain why it certified it was a small business, because it also stated in the offer that "not all" of the supplies to be furnished under the contract would be manufactured/produced by an appropriate small business concern. In this regard, the RFP incorporated the Federal Acquisition Regulation (FAR) provision at 48 C.F.R. § 52.219-6 (1985) ("Notice of Total Small Business Set-Aside"), which provided that only offerors offering end items manufactured/produced by small business concerns would be eligible for contract award. APEC advised verbally that, while it was true that not all of the supplies to be furnished would be manufactured by small businesses, less than 10 percent of its offered price represented supplies manufactured by large businesses. In confirming its price, APEC did not formalize this verbal advice, but rather stated that: "More than 50 percent of the components of this system are domestic end products."

Prior to receiving this information, the contracting officer considered withdrawing the small business set-aside under FAR, 48 C.F.R. § 19.506(a) (1986), apparently in the belief that APEC was not eligible for an award, and because of the 32 percent higher price submitted by the only apparent small business offeror. Upon receipt of the APEC information, the contracting officer determined that there was no need to resolicit the procurement on an unrestricted basis since APEC could be considered a nonmanufacturer small business concern

pursuant to FAR, 48 C.F.R. § 19-102(f), which provides that if more than 50 percent of the total value of a "kit" is to be accounted for by supplies manufactured by small business concerns, the concern which purchases the items and packages them as a kit may be considered small. The contracting officer therefore awarded the contract to APEC.

Although the normal procedure is to provide unsuccessful offerors 5 days advance notice of an intended award to protest the size status of the proposed awardee with the Small Business Administration (SBA), a contracting officer may make award without giving this notice where it is determined that urgency necessitates award without delay. FAR, 48 C.F.R. § 15.1001(b)(2). The contracting officer here determined award should be made without delay due to a need to relieve severe work backlogs and work stoppages resulting from delays in processing incoming calls, and due to the fact that a delay in award would result in the loss of the funds for the procurement.

Upon learning of the award, CVTC timely protested APEC's small business status to the contracting officer, who referred the protest to the SBA. About 6 weeks after award, the SBA ruled that APEC did not qualify as a small business concern for the purposes of this procurement. APEC did not appeal.

CVTC contends that the Army improperly awarded the contract to a large business. Further, CVTC contends that APEC is not--but fraudulently represented itself to be--a small business for the purposes of this procurement since the equipment it is offering is manufactured by a large business. CVTC states that the contracting officer improperly failed to give CVTC the required 5-day notice of the proposed award so that CVTC might request a ruling, prior to the making of an award, from the SBA as to APEC's small business status. CVTC also alleges that the system offered by APEC did not meet the RFP specifications and that the award to APEC on the basis of that system denied CVTC an opportunity to offer a comparable less expensive system. Finally, CVTC contends that the APEC offer was unacceptable since APEC failed to provide the required list of its sources of supply with its initial offer and that, although the contracting officer did not have time to permit CVTC to appeal APEC's size status prior to award or to negotiate with CVTC, the contracting officer unfairly found time for APEC to correct this deficiency and improperly entered into discussions with APEC.

Since the contracting officer awarded the contract prior to the size protest, based upon a determination that urgency necessitated an award without delay, the award was properly

made. Renaissance Enters., Inc., B-222201, July 2, 1986, 86-2 CPD ¶ 24. Notwithstanding the validity of the award, we have held that an agency should consider terminating such an award for convenience if, pursuant to a timely size protest, the contractor is found to be a large business. Solon Automated Servs., Inc., B-198670, Nov. 18, 1980, 80-2 CPD ¶ 365. We understand that the contracting agency does not believe termination is appropriate because the system is urgently needed to shorten the processing time for incoming calls which has resulted in severe work backlogs.

Regardless of the urgency perceived by the Army, we do not believe that termination of the APEC contract is warranted. The record shows that the contracting officer determined that CVTC's price was unreasonable because it was 32 percent higher than APEC's. A contracting officer may cancel a small business set-aside where the price submitted by the sole responsive small business offeror is considered to be unreasonable. Mid South Indus., Inc., B-216281, Feb. 11, 1985, 85-1 CPD ¶ 175. Thus, if the award had not been made to APEC, it appears that the contracting officer, rather than award to CVTC, would have canceled the solicitation. Similarly, if the APEC contract is terminated, the procurement would be canceled since award cannot be made to CVTC at an unreasonable price. Moreover, in a resolicitation (that obviously would be on an unrestricted basis) it appears that CVTC could not be expected to offer a lower price--CVTC states in its reply to the agency report that the price of its system was based on item prices submitted to the General Services Administration for acceptance by government agencies and complains that it cannot reduce those prices for this procurement without having to reduce them for all future procurements. Thus, we conclude that the continuation of the APEC contract here would not be prejudicial to CVTC.

With respect to any contention that APEC misrepresented its small business size status, there is insufficient evidence in the protest record to show that APEC's representation, albeit mistaken, was made in other than good faith. Had APEC intended to misrepresent its size status, it is unlikely that it would have created questions as to that status by indicating in its proposal that "not all" of the supplies to be furnished would be manufactured/produced by small business concerns. We note, in this regard, that the SBA determination that APEC is not a small business for this procurement is based not on the applicable size standard, but on APEC's intention to supply end items not manufactured by a small business. Thus, CVTC's contention regarding fraudulent misrepresentation is not borne out on this record and does not constitute a basis upon which to question the award. Trail Blazer Servs., B-220724, Feb. 12, 1986, 86-1 CPD ¶ 275.

We will not consider CVTC's allegation that APEC's system does not meet the RFP specifications. CVTC did not timely specify any deficiencies in APEC's proposal; in its original protest, CVTC merely alleged that the APEC system did not meet the RFP specifications. Our Bid Protest Regulations require a protest to include a detailed statement of the legal and factual grounds for the protest, 4 C.F.R. § 21.1(c)(4); CVTC did not submit a statement of the alleged deficiencies in APEC's system until commenting on the agency report. Our regulations do not permit such piecemeal development of protest issues. Contel Information Sys., Inc., B-220215, Jan. 15, 1986, 86-1 CPD ¶ 44. For this reason, we will not consider CVTC's detailed reasons for alleging that the APEC system did not meet the specifications.

Finally, concerning CVTC's contention that the agency unfairly permitted APEC to furnish information after the receipt of proposals, we note, first, that APEC did furnish with its proposal the required list of its sources of supply. The information on these sources that APEC provided after the submission of its proposal was not information that had been required for submission with the proposal, and it was furnished solely for the purpose of assisting the agency in resolving the question of APEC's small business status. Contrary to CVTC's assertion that APEC should have provided information on each portion of its system to show how these met the specifications, the RFP did not require the submission of such information.

The agency did conduct discussions, however, by permitting APEC to correct its statement that supplies would not be manufactured/produced by small business concerns. We do not believe, however, that this prejudiced CVTC. Since the agency found the CVTC proposal acceptable--no deficiencies existed in the proposal which should have been brought to CVTC's attention--it could have satisfied its obligation to negotiate with all offerors merely by requesting CVTC to submit a best and final offer. Action Mfg. Co., B-222151, June 12, 1986, 86-1 CPD ¶ 546. We do not see how such a request would have resulted in CVTC changing its proposal since the system CVTC offered met the RFP specifications and since, as mentioned above, CVTC apparently would not have changed its offered price.

Accordingly, the protest is denied.

for *Seymour Efron*
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General Counsel